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DEPARTMENT OF EDUCATION

34 CFR Chapter II

[Docket ID ED-2019-OPEPD-0019]

1875-AA12

Secretary's Proposed Priority for Discretionary Grant  
Programs

AGENCY: Department of Education.

ACTION: Proposed priority.

SUMMARY: The Secretary of Education proposes to establish a priority for discretionary grant programs that would align the Department of Education's (the Department's) discretionary grant investments with the Administration's Opportunity Zones initiative, which aims to spur economic development and job creation in distressed communities.

DATES: We must receive your comments on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments submitted by fax or by email or those submitted after the comment period. To ensure that we do not receive duplicate copies, please submit your comments only once. In addition, please

include the Docket ID at the top of your comments.

- Federal eRulemaking Portal: Go to [www.regulations.gov](http://www.regulations.gov) to submit your comments electronically. Information on using Regulations.gov, including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under "Help."

- Postal Mail, Commercial Delivery, or Hand Delivery: If you mail or deliver your comments about this proposed priority, address them to Allison Holte, U.S. Department of Education, 400 Maryland Avenue, SW, room 4W243, Washington, DC 20202-5970.

Privacy Note: The Department's policy is to make all comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov). Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Allison Holte, U.S. Department of Education, 400 Maryland Avenue, SW, room 4W243, Washington, DC 20202-5970. Telephone: (202) 205-7726. Email: [allison.holte@ed.gov](mailto:allison.holte@ed.gov).

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay

Service (FRS), toll free, at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

Invitation to Comment: We invite you to submit comments regarding the proposed priority. To ensure that your comments have maximum effect in developing the notice of final priority, we urge you to identify clearly the specific issues that each comment addresses. We are particularly interested in comments that provide examples of how Qualified Opportunity Funds can support activities carried out under the Department's discretionary grant programs.

We invite you to assist us in complying with the specific requirements of Executive Orders 12866, 13563, and 13771 and their overall requirement of reducing regulatory burden that might result from this proposed priority. Please let us know of any further ways we could reduce potential costs or increase potential benefits while preserving the effective and efficient administration of our programs.

During and after the comment period, you may inspect all public comments about the proposed priority by accessing Regulations.gov. You may also inspect the comments in person in 400 Maryland Avenue, SW, room 4W243, Washington, DC, between the hours of 8:30 a.m. and 4:00

p.m., Eastern Time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals with Disabilities in Reviewing the Rulemaking Record: On request, we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for the proposed priority. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under FOR FURTHER INFORMATION CONTACT.

Program Authority: 20 U.S.C. 1221e-3.

PROPOSED PRIORITY:

This document contains one proposed priority.

Spurring Investment in Qualified Opportunity Zones.

Background: Public law (P.L.) 115-97 authorized the designation of Qualified Opportunity Zones (i.e., designated distressed communities) to promote economic development and job creation in distressed communities through preferential tax treatment for investors. Distressed communities could qualify as Opportunity Zones if they are nominated for that designation by the Chief Executive Officer of their State and then certified by the Secretary of the Treasury. The Secretary of the Treasury

has certified more than 8,700 Qualified Opportunity Zones, approximately 12 percent of U.S. Census Tracts, across the 50 States, the District of Columbia, and five U.S. Territories.<sup>1</sup>

Specifically, P.L. 115-97 added sections 1400Z-2 and 1400Z-1 of the Internal Revenue Code of 1986 (IRC) to encourage economic growth and investment in Qualified Opportunity Zones by providing Federal income tax benefits to taxpayers who invest in businesses located within these zones. Section 1400Z-2 provides two main tax incentives to encourage investment in Qualified Opportunity Zones. First, it allows for the deferral of inclusion in gross income for certain gains to the extent that corresponding amounts are reinvested in a Qualified Opportunity Fund. Second, it excludes from gross income the post-acquisition gains on investments in a Qualified Opportunity Fund that are held for at least 10 years.

Through this proposed priority, we seek to expand and improve the opportunities available to individuals in Qualified Opportunity Zones by (1) encouraging applicants to plan projects in Qualified Opportunity Zones; (2) soliciting applications from eligible entities who are

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<sup>1</sup> See: <https://www.cdfifund.gov/Pages/Opportunity-Zones.aspx>.

located in Qualified Opportunity Zones; or (3) soliciting applications from eligible entities that have received investments, including accessing real estate that has received investment from Qualified Opportunity Funds for a purpose directly related to their proposed projects. A list of Qualified Opportunity Zones is available at: [www.cdfifund.gov/Pages/Opportunity-Zones.aspx](http://www.cdfifund.gov/Pages/Opportunity-Zones.aspx).

Under this proposed priority, the Department would have flexibility to use one or more of the priority's subparts in a given competition and, with respect to subpart (c), may give applicants additional time prior to the Department's award of grants to provide evidence of investment from a Qualified Opportunity Fund. We recognize that such additional time may be needed to enable an applicant to provide documentation of investment from a Qualified Opportunity Fund or that real estate they are accessing has received investment from a Qualified Opportunity Fund. If the Department elects to give applicants additional time, we will announce in the notice inviting applications (NIA) the deadline by which such evidence must be provided.

The Department may make changes to this proposed priority in response to final regulations from the Department of the Treasury when those regulations are

published. Commenters are encouraged to view the proposed regulations, "Investing in Qualified Opportunity Funds," which were originally published in the *Federal Register* on October 29, 2018 (83 FR 54279), and then updated on May 1, 2019 (84 FR 18652), and are available at [www.federalregister.gov/d/2018-23382](http://www.federalregister.gov/d/2018-23382) and [www.federalregister.gov/documents/2019/05/01/2019-08075/investing-in-qualified-opportunity-funds](http://www.federalregister.gov/documents/2019/05/01/2019-08075/investing-in-qualified-opportunity-funds), respectively.

Proposed Priority: Under this priority, an applicant must demonstrate one or more of the following:

(a) The area in which the applicant proposes to provide services overlaps with a Qualified Opportunity Zone, as designated by the Secretary of the Treasury under section 1400Z-1 of the IRC. An applicant must--

(i) Provide the census tract number of the Qualified Opportunity Zone(s) in which it proposes to provide services; and

(ii) Describe how the applicant will provide services in the Qualified Opportunity Zone(s).

(b) The applicant is located in a Qualified Opportunity Zone. The applicant is located in a Qualified Opportunity Zone if the applicant has multiple locations, at least one of which is within a Qualified Opportunity

Zone, or if the applicant's location overlaps with a Qualified Opportunity Zone. The applicant must provide the census tract number of the Qualified Opportunity Zone in which it is located.

(c) The applicant has received, or will receive by a date specified by the Department, an investment, including access to real property, from a Qualified Opportunity Fund under section 1400Z-2 of the IRC for a purpose directly related to its proposed project. An applicant must--

(i) Identify the Qualified Opportunity Fund from which it has received or will receive an investment; and

(ii) Describe how the investment would be directly related to its proposed project.

Types of Priorities:

When inviting applications for a competition using one or more priorities, we designate the type of each priority as absolute, competitive preference, or invitational through a notice in the *Federal Register*. The effect of each type of priority follows:

Absolute priority: Under an absolute priority, we consider only applications that meet the priority (34 CFR 75.105(c) (3)).

Competitive preference priority: Under a competitive preference priority, we give competitive preference to an



application by (1) awarding additional points, depending on the extent to which the application meets the priority (34 CFR 75.105(c)(2)(i)); or (2) selecting an application that meets the priority over an application of comparable merit that does not meet the priority (34 CFR 75.105(c)(2)(ii)).

Invitational priority: Under an invitational priority, we are particularly interested in applications that meet the priority. However, we do not give an application that meets the priority a preference over other applications (34 CFR 75.105(c)(1)).

Final Priority:

We will announce the final priorities, requirements, definitions, and selection criteria in a document in the *Federal Register*. We will determine the final priority after considering public comments and other information available to the Department. This document does not preclude us from proposing additional priorities, requirements, definitions, or selection criteria, subject to meeting applicable rulemaking requirements.

Note: This document does not solicit applications. In any year in which we choose to use this priority, we invite applications through a notice in the *Federal Register*.

Executive Orders 12866, 13563, and 13771

Regulatory Impact Analysis

Under Executive Order 12866, it must be determined whether this regulatory action is "significant" and, therefore, subject to the requirements of the Executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action likely to result in a rule that may--

(1) Have an annual effect on the economy of \$100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities in a material way (also referred to as an "economically significant" rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

This proposed regulatory action is a significant regulatory action subject to review by OMB under section

3(f) of Executive Order 12866.

Under Executive Order 13771, for each new rule that the Department proposes for notice and comment or otherwise promulgates that is a significant regulatory action under Executive Order 12866, and that imposes total costs greater than zero, it must identify two deregulatory actions. For FY 2019, any new incremental costs associated with a new regulation must be fully offset by the elimination of existing costs through deregulatory actions. Although this regulatory action is a significant regulatory action, the requirements of Executive Order 13771 do not apply because this regulatory action is a "transfer rule" not covered by the Executive order.

We have also reviewed this proposed regulatory action under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency--

(1) Propose or adopt regulations only upon a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden

on society, consistent with obtaining regulatory objectives and taking into account--among other things and to the extent practicable--the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives--such as user fees or marketable permits--to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency "to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include "identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes."

We are issuing this proposed priority only on a reasoned determination that its benefits would justify its costs. In choosing among alternative regulatory approaches, we selected those approaches that would maximize net benefits. Based on the analysis that follows, the Department believes that this regulatory action is consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action would not unduly interfere with State, local, and Tribal governments in the exercise of their governmental functions.

In accordance with both Executive orders, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action. The potential costs are those resulting from statutory requirements and those we have determined as necessary for administering the Department's programs and activities.

#### Discussion of Potential Costs and Benefits

The Department believes that this regulatory action would not impose significant costs on eligible entities, whose participation in our programs is voluntary. Additionally, the benefits of the proposed priority outweigh any associated costs because it would result in

the Department's discretionary grant programs selecting high-quality applications to implement activities that are designed to increase education opportunities and improve education outcomes while also targeting investment in our Nation's most economically distressed communities.

The Secretary believes that the costs imposed on applicants by the proposed priority would be limited to paperwork burden related to preparing an application for a discretionary grant program that is using the priority in its competition. The proposed priority would likely result in Federal funds transferring from areas that are not designated as Qualified Opportunity Zones to areas that have received that designation. However, the Department has no way of meaningfully estimating the amount of such transfers because the number of programs that may use the proposed priority in a future grant competition is unknown, the amount of future funding available for new awards in such programs is unknown, and the number of applicants likely to apply for grants under the proposed priority is unknown. Some of the Department's discretionary grant programs have included priorities for Qualified Opportunity Zones in their fiscal year 2019 competitions, but those competitions have not yet closed.

Regulatory Flexibility Act Certification: The

Secretary certifies that this proposed regulatory action would not have a significant economic impact on a substantial number of small entities. The U.S. Small Business Administration (SBA) Size Standards define proprietary institutions as small businesses if they are independently owned and operated, are not dominant in their field of operation, and have total annual revenue below \$7,000,000. Nonprofit institutions are defined as small entities if they are independently owned and operated and not dominant in their field of operation. Public institutions are defined as small organizations if they are operated by a government overseeing a population below 50,000.

We certify that that this proposed regulatory action would not have a significant economic impact on small entities. This proposed priority would be used in the Department's discretionary grant competitions, and small entities may choose whether to participate. The Secretary believes that the costs imposed on small entities by the proposed priority would be limited to paperwork burden related to preparing an application for a discretionary grant program that is using the priority in its competition. Further, the Secretary believes that this proposed priority may help small entities because it would

allow the Department to provide incentives for applicants to conduct their projects in Qualified Opportunity Zones, thus directing additional resources to some small entities in our Nation's most economically distressed communities.

Intergovernmental Review: Some of the programs affected by this proposed priority are subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the program contact person listed under FOR FURTHER INFORMATION CONTACT.

Electronic Access to This Document: The official version of this document is the document published in the *Federal Register*. You may access the official edition of the *Federal Register* and the Code of Federal Regulations at [www.govinfo.gov](http://www.govinfo.gov). At this site you can view this document,



as well as all other documents of this Department published in the *Federal Register*, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the *Federal Register* by using the article search feature at [www.federalregister.gov](http://www.federalregister.gov). Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: July 24, 2019.

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Betsy DeVos,  
*Secretary of Education.*

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